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NO. 83-128

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES OF AMERICA, Petitioner,

vs.

WILLIAM GOUVEIA, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT ROBERT RAMIREZ IN OPPOSITION

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Attorney for Respondent  
ROBERT RAMIREZ

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA, Petitioner,

vs.

WILLIAM GOUVEIA, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
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BRIEF OF RESPONDENT ROBERT RAMIREZ IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at  
704 F. 2d 1116 (9th Cir. 1983).

JURISDICTION

The judgment of the Court of Appeals was entered on  
April 26, 1983. The petition for writ of certiorari was filed  
by the Government on July 25, 1983, after being granted a  
thirty-day extension of time. The jurisdiction of the Court  
is invoked under 28 U.S.C. 1254(1).

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STATEMENT

Thomas Trejo was an inmate at the Federal Correctional Institute at Lompoc, California. On November 11, 1978, Mr. Trejo, who was also known as "Hopo", was stabbed to death in Cell A-18 of M Unit at the prison. He had received 43 stab wounds in the heart. The autopsy surgeon estimated the time of death to be between noon and 1:00 p.m.

On the evening of November 11, 1978, three of the Respondents in this case, Adolpho Reynoso, Pedro Flores and William Gouveia, were placed in solitary confinement in the Administrative Detention Unit (ADU). On November 22, 1978, these three Respondents were returned to the general population. According to the declaration of James R. Wilkins, the FBI had made a determination as of December 4, 1978, concerning who was responsible for the death of Thomas Trejo. On December 4, 1978, the prison officials placed Adolpho Reynoso, Pedro Flores, William Gouveia, Robert Ramirez, Phillip Segura and Steven Kinard into solitary confinement. These six individuals were the suspects in the Thomas Trejo murder.

However, these six individuals, including the Respondent Robert Ramirez, were not indicted for the murder of Thomas Trejo until June 17, 1980. And the first time that the defendants were brought into court for an arraignment was on July 14, 1980. Thus, Respondent Robert Ramirez remained in solitary confinement as a suspect in the murder of Thomas Trejo for twenty months before being brought to court to face criminal charges alleging that he was the murderer of Thomas Trejo.

Respondent Ramirez, during this period of time, was interrogated by the FBI on three occasions. He was questioned twice in November of 1978 and once on December 4, 1978. On the December 4, 1978 occasion, Respondent Ramirez requested

1 that an attorney be provided for him. This request appears  
2 in the FBI report concerning the interrogation prepared by  
3 James R. Wilkins. An attorney was not formally appointed to  
4 represent Mr. Ramirez on the murder charge until July 14,  
5 1980, when Mr. Ramirez appeared to enter a plea of not guilty  
6 to the indictment.

7 By the time that Respondent appeared in court on  
8 July 14, 1980, over 21 months had passed since the date of  
9 the death of Thomas Trejo. Because of the delay on the part  
10 of the government, almost two years had elapsed before the  
11 Respondent was brought to trial. Because of this long delay  
12 in bringing a formal charge against the Respondent and providing  
13 him with counsel, the attorney that was ultimately appointed  
14 to represent Respondent was forced to conduct an investigation  
15 into the case almost two years after the death had occurred.

16 With the passage of so much time between the date of  
17 the death and the appointment of counsel for Respondent,  
18 several difficulties arose. Witnesses were difficult to locate  
19 and memories of the events of November 11, 1978 had begun to  
20 fade. Several names listed in the Respondent's "notice of  
21 alibi" did not appear and testify at trial because they could  
22 not be located. In essence, while the Government was able  
23 to begin their investigation on the very day of the murder and  
24 continue that investigation for two years, the Respondent, on  
25 the other hand, was deprived of the opportunity to conduct a  
26 fresh investigation while the memories of witnesses were still  
27 clear, and while those witnesses could still be found.

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ARGUMENT

In this case, the Court of Appeals for the Ninth Circuit held that lengthy preindictment isolation without the assistance of counsel irrevocably prejudiced the ability of the Respondents to prepare an effective defense, and thus unconstitutionally deprived them of their Sixth Amendment right to counsel and to a fair trial. United States v. Gouveia, 704 F. 2d 1116, 1119 (9th Cir. 1983). Since the Government's conduct in this case resulted in harm which was not capable of after-the-fact remedy, the Ninth Circuit ruled that the Respondents were in a position similar to suspects who were denied a speedy trial, and thus dismissal of the indictment was the only certain remedy. United States v. Gouveia, supra, at 1125-1127.

A. THE RIGHT TO COUNSEL.

The Government argues that the opinion of the Ninth Circuit is in conflict with Kirby v. Illinois, 406 U.S. 682 (1972). This Court stated in Kirby that the Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated" against an accused. Kirby v. Illinois, supra, at 688. Thus, in Kirby, this Court held that the right to counsel does not attach to out-of-court eyewitness identification procedures conducted prior to indictment. See also, United States v. Ash, 413 U.S. 300 (1973) (no right to counsel at photographic showups).

However, the facts in the case now before this Court are far different from the situations that existed in Kirby and Ash. In Kirby, for example, the defendant was claiming that he was entitled to the presence of counsel at a pre-indictment lineup, which occurred on the same day that the defendant was arrested. The Court was reluctant to extend such a right

1 to counsel, which it noted, did exist during a post-indictment  
2 lineup. See, United States v. Wade, 388 U.S. 218 (1968).

3 The Respondent's right to counsel issue does not  
4 arise in the context of a pre-indictment lineup. Indeed,  
5 eyewitness identification has nothing to do with this case.  
6 The Respondent Ramirez and his three co-defendants were  
7 deprived of their right to counsel for twenty months while  
8 they were placed in solitary confinement as suspects in a  
9 prison murder.

10 This occurred while the Government conducted its  
11 investigation into the case with the help of the Federal Bureau  
12 of Investigation. Since Respondent was serving a federal  
13 prison sentence for bank robbery, within a month after the  
14 murder, the prison held a prison disciplinary hearing at which  
15 the Respondent was found guilty of the murder. His punishment  
16 was loss of good time sentence credits and placement in  
17 solitary confinement. At the hearing, however, the Respondent  
18 asked for the assistance of an attorney. Since the Respondent  
19 was indigent, he was unable to privately retain an attorney.  
20 No attorney was provided for the Respondent until he was  
21 indicted twenty months later.

22 Although the Kirby decision does appear to limit the  
23 right to counsel to the post-indictment stage, a different rule  
24 must be applied to cases involving prison crimes, such as  
25 occurred in this case. In Escobedo v. Illinois, 378 U.S. 478  
26 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966), this Court  
27 extended the right to counsel to the post-arrest interrogation  
28 of an accused by the police, even though such interrogation  
29 occurred prior to indictment. Later, in United States v. Wade,  
30 388 U.S. 218, 227 (1967), this Court, in extending the right  
31 to counsel to the defendant's participation in a lineup, stated  
32 that a defendant enjoys a right to counsel at every critical



1 stage in the prosecution.

2       Clearly a critical stage in the prosecution occurred when  
3 the Respondent was placed in solitary confinement, deprived of  
4 counsel, and excluded from participation in the investigation  
5 into the prison homicide in which he was a suspect. Respondent's  
6 placement in solitary confinement was clearly the first step  
7 in the prosecution by the Government of its case against the  
8 Respondent and his co-defendants. The Government's argument  
9 that the administrative detention of a prisoner, who is a  
10 suspect in a prison crime, is not accusatory, is an argument  
11 that ignores the reality of what occurred in this case. The  
12 placement of the Respondent in solitary confinement was not  
13 merely a security measure. If it was only a security measure,  
14 there would have been no criminal prosecution. Here, there was  
15 such a prosecution.

16       It is true that a person is not an "accused" within  
17 the meaning of the Sixth Amendment right to a speedy trial  
18 until he is indicted. United States v. MacDonald, 456 U.S. 1,  
19 6 (1982); United States v. Marion, 404 U.S. 703 (1971).  
20 However, MacDonald and Marion are not right-to-counsel cases.  
21 They are speedy trial cases, which focus upon the time within  
22 which criminal charges are brought to trial. The right to  
23 counsel provision of the Constitution is concerned more with  
24 the underlying fairness of the proceedings, and thus precise  
25 questions of time are not as critical to the determination of  
26 when the right to counsel is to apply.

27       The Government has argued that the Ninth Circuit's  
28 opinion in this case will interfere with the security measures  
29 taken by the prison authorities in connection with prison  
30 crimes. It is argued that there should be no right to counsel  
31 recognized in this situation because this is merely the  
32 investigation stage of the proceeding and the prison has no

1 statutory authority to appoint counsel for prisoners suspected  
2 of criminal acts.

3         However, in Miranda and Escobedo, this Court afforded  
4 a right to counsel to suspects during custodial interrogation.  
5 This was done despite the fact that custodial interrogation is  
6 part of the investigatory stage of the prosecution and the fact  
7 that the police have no power to appoint counsel for the suspect  
8 under interrogation. It was also argued in Miranda and  
9 Escobedo that recognition of the right to counsel at the  
10 interrogation stage would interfere with police conduct of  
11 criminal investigations. However, none of these arguments  
12 were accepted by this Court in Miranda or Escobedo.

13         The case of Miranda v. Arizona, 384 U.S. 436 (1966)  
14 did not result in the placement of lawyers at police stations  
15 for the purpose of being appointed to represent suspects  
16 during custodial interrogation. It resulted in the termination  
17 of all police interrogation when the suspect, after being  
18 informed of his right to counsel, requested counsel to be  
19 present at the interrogation.

20         In the same manner, the Ninth Circuit's opinion in  
21 the Gouveia case will not result in the placement of lawyers  
22 in the prisons to assist the prisoners in the investigation  
23 of their cases. It will, however, result in avoiding in the  
24 future those situations in which a prisoner is placed in  
25 solitary confinement for twenty months prior to indictment  
26 without the assistance of counsel during that time.

27         Although the Ninth Circuit's opinion in this case  
28 focuses upon the right to counsel, it also rests in part upon  
29 the fact that the Government unnecessarily delayed bringing the  
30 indictment in this case. During that period of delay, the  
31 Government slowly investigated and prepared its case, while the  
32 Respondent was kept in isolation away from the assistance of

1 counsel. After the passage of twenty months, when counsel was  
2 finally appointed to represent the Respondent, the case had  
3 become so old that Respondent's constitutional right to counsel  
4 was infringed upon. Thus, the Ninth Circuit's opinion is  
5 designed to prevent, in the future, long delays in the  
6 initiation of criminal charges in cases involving prison  
7 crimes. The ultimate effect, of course, is to protect the  
8 accused's right to counsel, recognizing the fact that  
9 counsel's effectiveness can best be assured by his early  
10 entry into the case on behalf of the accused.<sup>1/</sup>

11  
12 B. THE REMEDY OF DISMISSAL.

13 The Government has also argued that dismissal of the  
14 indictment was not the appropriate remedy in this case, even  
15 assuming a violation of the right to counsel has occurred.  
16 The Government relies upon this Court's recent opinion in  
17 United States v. Morrison, 449 U.S. 361 (1981).

18 In Morrison, this Court held that dismissal of an  
19 indictment because of a violation of the Sixth Amendment right  
20 to counsel is not an appropriate remedy unless there is some  
21 showing of an adverse consequence to the representation of  
22 the accused or to the fairness of the proceeding leading to  
23 conviction. In Morrison, this Court found that no prejudice  
24 occurred when the accused was visited by Government agents  
25 in the absence of her counsel. Thus, dismissal of the indictment  
26

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27 1/The Solicitor General has suggested that there is no  
28 violation of an inmate's right to counsel because the prison  
29 provides a "staff representative" to assist accused prisoners  
30 at administrative detention hearings. Such a suggestion is  
31 patently absurd. First, the staff member is not a lawyer.  
32 Secondly, the staff member is in reality a prison guard.  
There is no attorney-client privilege affording the prisoner  
confidentiality in his dealings with the staff member. And  
finally, the staff member is more likely to be viewed by  
the prisoner as a spy for the government.

1 was not appropriate under the facts of the Morrison case.

2       However, this Court's opinion in Morrison did not  
3 reject the remedy of dismissal in the appropriate case. This  
4 Court stated that "Our approach has thus been to identify and  
5 then neutralize the taint by tailoring relief appropriate in  
6 the circumstances to assure the defendant the effective  
7 assistance of counsel and a fair trial." United States v.  
8 Morrison, 449 U.S. 361, 365 (1981). In some cases, the  
9 appropriate remedy is to reverse the conviction and order a  
10 new trial at which evidence obtained in violation of the right  
11 to counsel is suppressed. See, Massiah v. United States,  
12 377 U.S. 201 (1964); United States v. Wade, 388 U.S. 218  
13 (1967). But where there is a continuing prejudice which  
14 cannot be remedied by a new trial or suppression of evidence,  
15 this Court has recognized that dismissal of the indictment is  
16 the appropriate remedy. United States v. Morrison, supra,  
17 at 366 n.2, citing United States v. Marion, 404 U.S. 307,  
18 325-326 (1971).

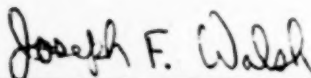
19       The instant case is one where there is a continuing  
20 prejudice that cannot be remedied by mere reversal of the  
21 conviction or suppression of evidence. Each of the Respondents  
22 were unable to locate defense witnesses because the witnesses,  
23 many known only by nicknames, were transferred to other  
24 institutions, released from custody, or died before the  
25 Respondents were indicted and afforded counsel. The  
26 Government's delay in indicting the Respondents infringed upon  
27 their right to counsel because of counsel's inability to  
28 locate and present these defense witnesses. Because the  
29 blame is properly placed upon the Government for this  
30 infringement of the right to counsel and because it affects  
31 the fairness of the proceeding which led to the convictions,  
32 dismissal of the indictment is the appropriate remedy in this

1 case. The result reached by the Ninth Circuit is thus a  
2 natural extension of this Court's decision in United States  
3 v. Morrison, 449 U.S. 361 (1981).  
4

5 CONCLUSION

6 Based upon the foregoing, the Respondent Robert  
7 Ramirez urges that the Government's petition be denied.  
8

9 Respectfully submitted,  
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13 JOSEPH F. WALSH  
14 Attorney for Respondent  
15 ROBERT RAMIREZ  
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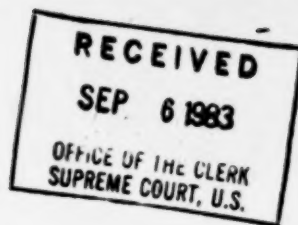
On August 31, 1983, I served the within  
BRIEF OF RESPONDENT ROBERT RAMIREZ IN OPPOSITION

Brooke Moyer



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**ORIGINAL**



NO. 83-128

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

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UNITED STATES OF AMERICA, Petitioner,

vs.

WILLIAM GOUVEIA, et al., Respondents.

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MOTION TO PROCEED IN FORMA PAUPERIS  
AND FOR THE APPOINTMENT OF COUNSEL;  
DECLARATION OF JOSEPH F. WALSH

---

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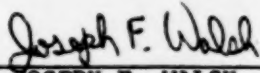
11 IN THE  
12 SUPREME COURT OF THE UNITED STATES  
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14 UNITED STATES OF AMERICA,	)	NO. 83-128
	)	
15 Petitioner,	)	MOTION TO PROCEED IN FORMA
	)	PAUPERIS AND FOR THE
16 vs.	)	APPOINTMENT OF COUNSEL;
	)	DECLARATION OF JOSEPH
17 WILLIAM GOUVEIA, et al.,	)	F. WALSH
	)	
18 Respondents.	)	
	)	

19 Pursuant to Rule 46 of the Rules of this Court,  
20 Respondent ROBERT RAMIREZ asks leave to file an opposition to  
21 a petition for writ of certiorari to the United States Court  
22 of Appeals for the Ninth Circuit without prepayment of costs  
23 and to proceed in forma pauperis.

24 Respondent further requests that Joseph F. Walsh,  
25 Attorney at Law, be appointed as counsel for Respondent in  
26 this Court. An affidavit in support of this motion is attached.

27 DATED: August 31, 1983.

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30 JOSEPH F. WALSH  
31 Attorney for Respondent  
32 ROBERT RAMIREZ

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1. That I am an attorney licensed to practice in the State of California and am admitted to the Bar of the United States Supreme Court;

3. That Respondent Robert Ramirez, because of his poverty, is unable to pay the costs or attorney fees for representation before this Court and is unable to give security for same;

5. If the petition for writ of certiorari is granted, it is respectfully requested that the Court appoint Joseph F. Walsh, Attorney at Law, 316 West Second Street, Suite 1200, Los Angeles, California, (213) 627-1793.

JOSEPH F. WALSH

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